

IN THE SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1982

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SAMPSON ARMSTRONG, PETITIONER

v.

STATE OF FLORIDA, ET AL.,  
RESPONDENT.

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RESPONSE IN OPPOSITION TO  
PETITION FOR A WRIT OF CERTIORARI  
TO THE SUPREME COURT OF FLORIDA

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### PRELIMINARY STATEMENT

Respondent accepts those portions of the Petition for Writ of Certiorari setting forth the Citations to Opinions Below, Jurisdiction, Constitutional and Statutory Provisions Involved found on pages one and two of the Petition.

### QUESTION PRESENTED

Whether the Florida Statute and the jury instructions under which petitioner was sentenced to death deprived the judge and jury of the constitutionally required freedom to consider and give independent weight to all relevant mitigating evidence.

### STATEMENT OF THE CASE

Petitioner, Sampson Armstrong, was tried and convicted of first degree murder. The Florida Supreme Court affirmed the judgment and sentence. Armstrong v. State, 399 So.2d 953 (Fla. 1981). Thereafter, petitioner moved in the trial court for post-conviction relief pursuant to Florida Rule of Criminal Procedure 3.850. Although not presented in his direct appeal, petitioner for the first time asserted the question presented in the instant Petition for Writ of Certiorari. The trial court denied petitioner's Motion for Post-Conviction Relief and the Florida Supreme Court affirmed. Armstrong v. State, 429 So.2d 287 (Fla. 1983). Petitioner now seeks certiorari relief in this court.

Subsequent to the jury finding of guilt on the first degree murder charge, the penalty phase of petitioner's trial was commenced. Following the submission of evidence at the penalty phase, the trial court instructed the jury concerning their responsibilities in advising the trial court as to the sentence to be imposed on the petitioner. The instructions of the court pertaining to the penalty phase are set forth below in its entirety:

"THE COURT: All right.

Ladies and gentlemen of the Jury, once again, you know what your responsibility today is at this portion of the trial. You are serving now as advisors to the Court and as advisors to the Court it will be your responsibility to make a recommendation. But the Court has the final discretion, responsibility, in this matter, and I have the power of independent judgement. Under these procedures, therefore, it is now your duty and responsibility to determine by a majority vote whether or not you advise the imposition of the death penalty based upon, one, whether sufficient aggravating circumstances as hereafter enumerated exist to justify the death penalty; two, whether sufficient mitigating circumstances exist as hereafter enumerated which outweigh the aggravating circumstances found to exist; and, thirdly, based upon these considerations, whether the Defendants should be sentenced to life or death.

Aggravating circumstances are limited by Statute to the following:

- (A) The capital felony was committed by a person under sentence of imprisonment.
- (B) The defendant was previously convicted of another capital offense or of a felony involving the use or threat of violence to the person.
- (C) The defendant knowingly created a great risk of death to many persons.
- (D) The capital felony was committed while the defendant was engaged or was an accomplice in the commission of or an attempt to commit or flight after committing or attempting to commit any robbery, rape, arson, burglary, kidnaping, aircraft piracy or the unlawful throwing or placing or discharging of a destructive device or bomb.
- (E) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.
- (F) The capital felony was committed for pecuniary--again, that means for money--or other valuable consideration.
- (G) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.
- (H) The capital felony was especially heinous, atrocious or cruel.

"Mitigating circumstances by Statute are:

(A) The defendant has no significant history of prior criminal activity,

(B) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(C) The victim was a participant in the defendant's conduct or consented to the act.

(D) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(E) The defendant acted under extreme duress or under the substantial domination of another person.

(F) Capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. And,

(G) The age of the defendant at the time of the crime.

Now, your determination and recommendation must be made objectively as it relates to each Defendant without bias or prejudice either for or against the State or for or against either one of these Defendants.

Now, you will have two forms of verdict as to each count and as to each Defendant. There are two counts of first degree murder. Your advisory sentence as to Count One, and this will be the one as it relates to Earl Enmund: We, the Jury, have heard evidence under the sentencing procedure in the above cause as to whether aggravating circumstances which were so defined in the Court's charge existed in the capital offense here involved and whether sufficient mitigating circumstances defined by the Court's charge do outweigh such aggravating circumstances, and we do find and advise that the aggravating circumstances do outweigh the mitigating circumstances. A majority of at least seven of us, therefore, advise the Court that the death penalty should be imposed herein upon the Defendant by the Court as to Count One.

Then, as to each count, you have the reverse, whether at least five--excuse me--at least seven of you find that the mitigating circumstances outweigh the aggravating circumstances.

All right. Members of the Jury, first of all, before you retire, are there any objections or corrections to the Court's instructions from the State?

"MR. WILCOX: No, your Honor.

THE COURT: From Defendant Sampson Armstrong?

MR. ANDERSON: Yes, your Honor. I have one objection and correction.

I think when you were listing the mitigating circumstances, Subparagraph (A), you read the defendant has no subsequent history or no criminal activity. I think it should have been instead of or.

MR. WILCOX: I heard the same thing Mr. Anderson did.

MR. ANDERSON: I am sure it is just a mistake.

THE COURT: All right. Let me read it again.

The defendant has no significant history of prior criminal activity.

Anything further, Mr. Anderson?

MR. ANDERSON: No, sir, nothing further.

THE COURT: Any further objection, Mr. Trombley?

MR. TROMBLEY: No objection.

THE COURT: Members of the Jury, you may now retire."

(R 1859 - 1864; Tr. 1433 - 1438)

Defense counsel deemed these instructions to be unobjectionable as evidenced by the colloquy set forth immediately above.

REASONS FOR DENYING THE  
PETITION FOR WRIT OF CERTIORARI

As is readily apparent upon a review of the colloquy between the trial court and the defense counsel after the trial court instructed the jury in the penalty phase, no objection was made by petitioner's trial counsel concerning the issue raised in the instant Petition for a Writ of Certiorari. Additionally, petitioner did not attempt to raise as an issue on direct appeal the now complained of instructions. Petitioner has waited several years before complaining about the adequacy of the trial court's charge during the penalty phase of a trial at which he had no objection at the time. Petitioner's Lockett claim was first raised

in his Motion for Post-Conviction Relief. Following the trial court's denial of petitioner's Motion for Post-Conviction Relief, the Florida Supreme Court affirmed the denial of post-conviction relief and, in so holding, predicated its decision on a procedural default. The Florida Supreme Court specifically held that the Lockett claim could have been and should have been raised on direct appeal. Having failed to do so, Armstrong was precluded from obtaining collateral relief and the contention was not a proper one to consider. Armstrong v. State, 429 So.2d 287 at 289. If the contention would have been proper, however, the Florida Supreme Court opined that the jury was not restricted in its consideration of mitigating factors.

The Florida Supreme Court based its holding with respect to the Lockett claim on the basis of a procedural default having occurred. The Florida Supreme Court did discuss the merits of the issue, presumably in an effort to give guidance to the Florida lower courts. However, where a State court rules alternatively, that is, on the basis of a procedural default and on the merits, the procedural default doctrine must be given credence. As the court held in United States ex rel. Caruso v. Zelinsky, 689 F.2d 435 (3rd Cir. 1982), at page 440:

Because we believe that the policies that justify deference to a valid state procedural rule at all are equally applicable whenever the state court actually relies on a procedural bar, we conclude that state court reliance on a procedural rule as an alternate holding suffices to implicate the procedural default doctrine.

This Honorable Court has in recent years consistently maintained that federal relief should be denied where a state prisoner has failed to comply with state procedural rules. Wainwright v. Sykes, 433 U.S. 72 (1977); Estelle v. Williams, 425 U.S. 501 (1976); Engle v. Isaac, 456 U.S. 107 (1982); United States v. Frady, 456 U.S. 152 (1982). Thus, this Honorable Court should decline to grant certiorari in the instant cause inasmuch as it is clear that the Florida Supreme Court held that petitioner's

Lockett claim was barred from consideration by virtue of the procedural default in failing to raise the issue either at trial or on direct appeal.

Secondly, petitioner's claim raised in the instant Petition for Writ of Certiorari fails to present an issue justifying the exercise of this Honorable Court's certiorari jurisdiction. This court has previously recognized that the Florida Statute presently under attack does not limit a jury's consideration of mitigating circumstances to those listed in the statute. Proffitt v. Florida, 428 U.S. 242 at 250, n. 8. More importantly, this Honorable Court had occasion to previously consider the Florida Statute presently under attack in the very case relied upon by petitioner. In Lockett v. Ohio, 438 U.S. 586 (1978), this court noted that although the Florida Statute approved in Proffitt contained a list of mitigating factors, six members of the court assumed, in approving the statute, that the range of mitigating factors listed in the statute was not exclusive. Lockett, Id., at 606. This court then held that none of the statutes sustained in Gregg v. Georgia, and its companion cases, one of which is Proffitt, supra, clearly operated at that time to prevent the sentencer from considering any aspect of the defendant's character and record or any circumstances of his offense as an independently mitigating factor. Lockett, supra, at 607. Thus, this Honorable Court has previously ruled on the precise issue raised in the instant Petition for Writ of Certiorari, that is, that the Florida death penalty statute does not limit the jury's consideration of any mitigating circumstances. See, also, Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), cert. denied, 440 U.S. 976 (1979).

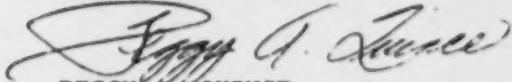
Inasmuch as petitioner's instant claim was denied by the Florida Supreme Court because a procedural default had occurred, and inasmuch as the question submitted in the instant Petition for Writ of Certiorari has previously been determined by this Honorable Court, review of the Order of denial of collateral relief by the Florida Supreme Court is inappropriate.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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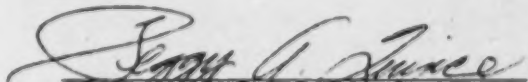


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by United States Mail to Peter Buscemi, Esquire, 1714 Massachusetts Avenue, N.W., Washington, D.C. 20036, and to Robert Young, Esquire, Post Office Box 428, Bartow, Florida 33830 on this the 30th day of August, 1983.

  
Of Counsel for Respondent  
Of Counsel for Respondent